BAKMAWAR SDN. BHD.

v.

MALAYAN BANKING BHD.

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAAKOB J
[SUIT NO. S2-22-1732-1990]
29 MARCH 1991

BANKING: *Credit cards issued by defendant bank - Merchant agreement - Fraud in use of cards at plaintiff's outlet - Amount charged back and debited to plaintiff's account - Whether defendant bank has authority to do so - Whether unauthorised and unlawful - Meaning of fraud - Bad cheques - Dishonouring - Details to Biro Maklumat Cek - Clause 10 of merchant agreement.*

CIVIL PROCEDURE: *Injunction - Merchant agreement - Credit card transactions - Fraud - Accounts debited and charged back - Whether defendant bank has authority - Construction of merchant agreement - Meaning of fraud - Clause 10 of merchant agreement.*

CIVIL PROCEDURE: *Injunction - Interim - Non-disclosure of material fact to Court.*

The plaintiff entered into a merchant agreement with the defendant, whereby the plaintiff agreed to accept all the defendant's credit cards issued by the defendant and tendered by the plaintiff's customers. In return, the defendant would make full payments on such transactions through the plaintiff's current account with the defendant.

The defendant received complaints from its cardholders that transactions conducted with their cards at Russell's, one of the plaintiff's outlets, were not conducted by them. As a result, the defendant charged back the disputed amount and accordingly debited the plaintiff's account with the defendant.

During this time, the defendant also dishonoured 3 cheques of the plaintiff for lack of funds, advised the plaintiff that it had submitted details of the plaintiff's account to the Biro Maklumat Cek at Bank Negara and notified the plaintiff that it would be closing the plaintiff's account on 2 November 1990.

The plaintiff obtained an *ex parte* interim injunction preventing the defendant from carrying out the latter two actions. The defendant applied to set aside the interim injunction.

Held:

[1] The defendant does have authority under the merchant agreement to charge back and debit the plaintiff's account; although the word "fraud" is not expressly mentioned in Clause 10 of the merchant agreement, para. (g) of Clause 10 is wide enough to include "fraud" as a form of violation of the law.

[2] The fact that with each credit card transaction, the plaintiff has telephoned the defendant to obtain its authorisation to use its card, makes no difference to the defendant's right to charge back a transaction where it was subsequently discovered that such a transaction had been fraudulently conducted, as such authorisation is nothing more than to confirm the floor limit. Therefore, the defendant did not act wrongly or negligently when it invoked Clause 10 to charge back the amount of the disputed sales from the plaintiff's account.

[3] As the issuance of the 3 bad cheques occurred within a period of 12 months, and since the plaintiff was fully aware at the time that the interim injunction was obtained that the Biro was already in receipt of the details of the plaintiff's account, the second limb of the interim injunction was redundant and unnecessary. The plaintiff therefore did not make full disclosure to the Court and the Court has therefore been misled into believing that the Biro has not yet been informed of the plaintiff's account and on this ground alone, the second limb of the interim injunction must be dissolved.

[Defendant's application granted with costs.]

For the Defendant/Applicant - F.J. Su; M/s. Meriam Cheah Teh & Su
For the Plaintiff/Respondent - Max Yong; M/s. Kiru & Yong

JUDGMENT

Siti Norma Yaakob J:

On 21 May 1988, the plaintiff entered into a merchant agreement with the defendant, whereby the plaintiff agreed to accept all Malayan Banking Cards issued by the defendant and tendered by the plaintiff's customers, as a mode of payment for food and beverage consumed by such customers at the plaintiff's restaurants. The defendant in turn would make full payments on such transactions through the plaintiff's current account with the defendant.

In the month of September and October 1990, a number of events occurred that triggered the filing of this suit. The defendant initially received complaints from 2 cardholders that transactions conducted with their cards in July and August 1990 at "Russel's", one of the plaintiff's outlets, were not conducted by them and the total amount disputed was RM10,553.10. The defendant then advised the plaintiff that it will execute a charge back on the disputed amount and that the plaintiff's account with the defendant would be debited accordingly.

However before such charge back was effected on 16 October 1990, the defendant discovered other disputed sales, all emanating from "Russel's" and as at 23 September 1990, the total disputed sales including the sum disputed earlier by the 2 cardholders, amounted to RM45,977.04. The defendant was not able to charge back the entire disputed sum of RM45,977.04 on 16 October 1990 as at that date, the plaintiff had only RM18,774.93 standing in its credit with the defendant and the defendant accordingly charged back the entire credit sum of RM18,774.93.

At about this time, the plaintiff presented 3 cheques for payment to the defendant, but the defendant dishonoured all the 3 cheques for lack of funds and advised the plaintiff so by letters dated 18 October 1990 and 20 October 1990. In the second letter dated 20 October 1990, the defendant also indicated to the plaintiff that details of the plaintiff's account had already been submitted to Biro Maklumat Cek at Bank Negara (the Biro), thereby prohibiting the plaintiff from opening a current account with any bank in Malaysia until such time its name has been removed from the "Black List" issued by the Biro. The defendant also gave notice that it was taking steps to close the plaintiff's account on 2 November 1990.

It was to prevent a closure of its account with the defendant as well as preventing the defendant from submitting details of its account to the Biro that the plaintiff applied and obtained an *ex parte* interim injunction on 1 November 1990. The plaintiff's *ex parte* application contained a number of other prayers as well but the plaintiff was agreeable to having the merits of the other prayers heard *inter partes* at a later stage.

On the application of the defendant to have the interim injunction set aside the following issues were raised:

1. Whether the defendant has the power to charge back and debit the plaintiff's account.
2. Whether there had been a non-disclosure of a material fact when the second limb of the interim injunction was obtained.

It is the defendant's case that it had powers under Clauses 10(c), (e) and (g) of the merchant agreement to charge back and debit the plaintiff's account. Clause 10 reads as follows.

> 10 Merchant agrees to pay bank the total face amount of any sales draft, and bank will have the right at any time to charge merchant's commercial account therefore without notice, in any situation relating to such sales drafts where:
>
> (c) the sales draft is alleged to have been drawn improperly or without authority.
>
> (e) the cardholder disputes the sale, quality, or delivery of merchandise or the performance or quality of services covered by the sales draft.
>
> (g) sale of merchandise, performance of services, or use of a Malayan Banking Card thereof involves a violation of law or the rules or regulations of any governmental agency or otherwise.

The plaintiff on the other hand maintains that the defendant's acts in charging back and debiting its account were unauthorised and unlawful and that it had wrongly invoked Clause 10.

It is not disputed that there had been instances of unlawful and unauthorised use of the defendant's cards at the plaintiff's outlet by person or persons unknown and the element of fraud is all too apparent. Under such circumstances, has the defendant the authority to invoke Clause 10?

I answer this positively for although the word "fraud" is not expressly mentioned in Clause 10, para. (g) of that clause is wide enough to include "fraud" as a form of a violation of the law. The fact that with each credit card transaction, the plaintiff had telephoned the defendant to get its authorisation to use its card, makes no difference to the defendant's right to charge back a transaction where it was subsequently discovered that such a transaction had been fraudulently conducted, as such authorisation is nothing more than to confirm the floor limit that is, the credit limit of a particular cardholder. It does not confirm that the person tendering the defendant's card is a *bona fide* cardholder or that the said card is genuine or a forgery. This is clear from Clause 5 of the merchant agreement itself which provides that the plaintiff cannot accept any of the defendant's card which exceeds the credit limitation of a particular cardholder.

On the facts of this case, I consider that the defendant did not act wrongly or negligently when it invoked Clause 10 to charge back the amount of the disputed sales from the plaintiff's account.

The second limb of the interim injunction prevents the defendant from submitting details of the plaintiff's account to the Biro. This Biro was set up by Bank Negara to monitor information pertaining to the occurrence of cheques dishonoured due to insufficient funds (bad cheques) and to disclose such information to any bank for the purpose only of assisting the bank to assess the eligibility of the drawer to maintain or open any current account with the bank. For this purpose, the Biro maintains a "Black List" of all account holders who have been in the habit of issuing bad cheques and they will not be allowed to operate or open new current accounts until their names are removed from the list.

Before the details of an account holder is submitted to the Biro, the account holder must at least be guilty of issuing 3 bad cheques within 12 months from the date of the first bad cheque issued from the same account. In this case, the first bad cheque issued by the plaintiff was MBB cheque number 507519 dated on 6 October 1990, which was paid into the payee's bankers, Chung Khiaw Bank Ltd. on 19 October 1990 but dishonoured by the defendant on 20 October 1990 as at that date the plaintiff's credit account showed 'nil'. The other 2 MBB cheques issued by the plaintiff are numbered 507508 and 507529 and were dishonoured by the defendant on 17 October 1990 for insufficient funds.

As the instances of issuance of the 3 bad cheques happened within a period of 12 months, and when the defendant wrote to the plaintiff on 20 October 1990 advising the plaintiff that it was submitting details of the plaintiff's account to the Biro, the plaintiff was fully aware that at the time the interim injunction was obtained on 1 November 1990, the Biro was already in receipt of the details of the plaintiff's account and that the second limb of the interim injunction was therefore redundant and unnecessary. It is true that the defendant's letter was exhibited to the plaintiff's *ex parte* application but it is incumbent upon the plaintiff on an *ex parte* application of this nature not only to make full disclosures but also to draw attention to all relevant factors so as not to mislead the Court into making an order that it would not have necessarily made. Had my attention been drawn to the fact that the second limb of the interim injunction was no longer necessary as the Biro had already been informed of the plaintiff's account, I would not have granted the order. In this case the Court has been mislead into believing that the Biro has not yet been informed of the plaintiff's account and on this ground alone, the interim injunction - at least the second limb of the injunction, must be dissolved.

As for the other prayers in the plaintiff's application for the interim injunction, as I have considered that the defendant had acted rightly under Clause 10 of the merchant agreement to charge back and debit the plaintiff's account for the disputed sales, there is therefore no merit on the plaintiff's application for the other prayers and I accordingly dissolved the interim injunction obtained on 1 November 1990 and dismissed the other prayers in the plaintiff's application with costs and directed that the plaintiff pay damages to the defendant to be assessed by the Senior Assistant Registrar for wrongly securing the interim injunction and to be paid forthwith. The costs of the present proceedings will also be borne by the plaintiff.

Also found at [1991] 3 CLJ 1759